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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 854

R. H. ROBINSON, LOWRANCE BROTHERS & COMPANY, INC., a corporation, LYNN W. MORRILL, S. CARL MILLER, W. H. AMOS, and W. G. PARKER, intervenors below, suing on behalf of themselves and other cotton producers similarly situated (including JAMES WYNN THOMPSON, JR., A. W. FISHER, D. S. HOPSON, and ALLIE H. WARD, Administratrix, the original plaintiffs below), *Petitioners*,

v.

ERNEST L. DEAL, Individually and as Manager of the National Surplus Cotton Tax Exemption Certificate Pool, 1935, HENRY A. WALLACE, Individually and as Secretary of Agriculture of the United States, W. A. JULIAN, Individually and as Treasurer of the United States, JOHN B. PAYNE, Individually and as Comptroller of the Agricultural Adjustment Administration, and CHESTER C. DAVIS, Individually and as Administrator of the Agricultural Adjustment Administration, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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January, 1945.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

The Court of Claims overruled an allegation to the contrary and sustained a demurrer because—

> **Not one penny of the amount paid into the [Bankhead Cotton Act] pool went into the general fund of the Treasury of the United States.**[1]

The Court below ignored the admissions of respondents to the contrary and held—

> * * * **that all moneys received in connection with the operation of the [same] pool had gone into the possession of and under the control of the United States * * * and had been duly covered into the Treasury of the United States * * * (R. 994).**

Only this Court can now resolve the conflict.

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[1] *Crain* v. *United States*, 96 C. Cls. 443, 454, 44 F. Supp. 321, 325-326, cert. den. 317 U. S. 667.

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v.

ERNEST L. DEAL, Individually and as Manager of the National Surplus Cotton Tax Exemption Certificate Pool, 1935, HENRY A. WALLACE, Individually and as Secretary of Agriculture of the United States, W. A. JULIAN, Individually and as Treasurer of the United States, JOHN B. PAYNE, Individually and as Comptroller of the Agricultural Adjustment Administration, and CHESTER C. DAVIS, Individually and as Administrator of the Agricultural Adjustment Administration, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners, R. H. Robinson, Lowrance Brothers & Company, Inc., a corporation, Lynn W. Morrill, S. Carl Miller, W. H. Amos, and W. G. Parker, intervenors below, suing on behalf of themselves and other cotton producers similarly situated (including James Wynn Thompson, Jr.,

A. W. Fisher, D. S. Hopson, and Allie H. Ward, Administratrix, the original plaintiffs below), pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled cause on October 23, 1944.

OPINIONS BELOW.

The first opinion of the District Court, dismissing this proceeding on respondents' motion, is unreported (R. 181-182).[1] The Court of Appeals for the District of Columbia thereafter reversed the District Court in an opinion filed June 28, 1937 (Appendix, *infra,* pp. 17-41),[2] and reported at 67 App. D. C. 327, 92 F. 2d 478. Four justices concurred in the reversal and one justice dissented.

Following a trial on its merits before the District Court, the case was again dismissed in an opinion filed March 24, 1943 (R. 965-970), and reported at 49 F. Supp. 366. Upon a second review the Court of Appeals affirmed the holding of the trial court in a *per curiam* opinion handed down October 23, 1944 (R. 992-995), and reported at 145 F. 2d 382.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered on October 23, 1944 (R. 996). The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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[1] References preceded by "R" refer to pages of the Joint Appendix filed in the Court of Appeals and thereafter certified to this Court.

[2] This opinion is not in the record and is therefore printed as an appendix to this petition. References to this opinion hereinafter will be preceded by "App."

QUESTIONS PRESENTED.

1. Do the courts of the United States have jurisdiction to decide between private litigants the title to an account in the United States Treasury when the account is made up of contributed trust funds with respect to which the United States makes no claim?

2. When contributed funds are deposited in trust in the United States Treasury pursuant to § 20 of the Permanent Appropriations Repeal Act and the express trust fails, do the funds remain appropriated so as to permit them to be returned to the contributors?

3. When respondents by their verified statements in this and other proceedings have prevented a recovery from the United States of the trust fund here involved, are they estopped from denying their previous statements regarding their possession of the fund?

4. When no question of judicial notice is involved and proper objections are made, may a trial court admit evidence and make findings of fact contrary to the facts alleged and admitted in the pleadings?

5. May trustees with notice that the trust has failed disburse the trust res to the original beneficiaries and thereby avoid personal liability in an action brought against them by the contributors for the return of the trust res?

STATUTES INVOLVED.

The statutes involved are the so-called Bankhead Cotton Act and §20 of the Permanent Appropriation Repeal Act, 1934. The Bankhead Cotton Act (Act of April 21, 1934, c. 157, 48 Stat. 598, amended 48 Stat. 1184, 49 Stat. 776, repealed 49 Stat. 1106) and its amendments are printed in the record (R. 51-62). The pertinent part of § 20 of the Permanent Appropriation Repeal Act, 1934 (Act of June 26, 1934, c. 756, 48 Stat. 1224, 31 U. S. C. A. § 725s) is as follows:

Sec. 20. (a) The funds appearing on the books of the Government and listed in subsections (b) and (c) of this section shall be classified on the books of the Treasury as trust funds. All moneys accruing to these funds are hereby appropriated, and shall be disbursed in compliance with the terms of the trust. Hereafter moneys received by the Government as trustee analogous to the funds named in subsections (b) and (c) of this section, not otherwise herein provided for, except moneys received by the Comptroller of the Currency or the Federal Deposit Insurance Corporation, shall likewise be deposited into the Treasury as trust funds with appropriate title, and all amounts credited to such trust-fund accounts are hereby appropriated and shall be disbursed in compliance with the terms of the trust: * * *

STATEMENT OF THE CASE.

In 1934 Congress enacted the Bankhead Cotton Act (R. 51-60) which levied a tax upon the ginning of cotton and provided for amounts of cotton to be produced tax-free in the ensuing years. This tax-free cotton was to be divided among the various cotton producers, and this was done by the issuance to them of certificates exempting from the tax a percentage of their normal production (R. 966, 974).

The tax was fifty per cent of the value of the cotton, but not less than five cents per pound, and applied to all cotton produced by a farmer in excess of his allotment (R. 52-53). The tax was to be collected by the ginner when the cotton was ginned (R. 405), unless, of course, the producer presented tax-exemption certificates covering his cotton (R. 56). If the tax were not paid or certificates surrendered, the ginner could not issue a "bale tag" for the cotton (R. 379, 828, 871), and in the absence of such a tag the owner could not sell his cotton or ship it outside of the county without subjecting himself to severe penalties (R. 57-58).

Under the regulations issued pursuant to the Act exemption certificates were transferrable in general at four cents a pound (R. 828, 875-876) while the tax itself exceeded five

cents a pound (R. 52). The certificates were transferable through the local county agricultural office or through a national pool administered by respondents (R. 966).

Under the procedure set up farmers who did not produce enough cotton to consume their allotted certificates could surrender their certificates *in trust* to respondent Deal, the manager of the national pool. He was to sell the certificates and account to these "under producers." (R. 966-967.)

The national pool had three sets of books or accounts (R. 974-975) because of changes in the price of cotton and in the transfer price of the exemption certificates (R. 565-566, 828-830, 898). Respondent Deal received only one appointment (R. 728, 976), the trust agreements were admittedly "similar in all material respects" (R. 126, 200, 747, 828, 874), and certificates unsold on the first set of books could be transferred to the second or third set (R. 147-148, 744-745). Furthermore, 1934 certificates could be surrendered in connection with any of the three accounts and certificates sold from any account could be used to market cotton produced in any year (R. 148).

Petitioners and the original plaintiffs are cotton producers located in Alabama, Mississippi, Arkansas, or Arizona. During one or both of the crop years 1934-35 and 1935-36 they were all engaged in the production of cotton on their respective farms and were members of the class here involved which had produced cotton in excess of the amount for which they were severally allotted tax exemption certificates. (R. 2, 193, 383, 403, 407.)

Respondents are individuals who were employed by the United States during the aforesaid crop years, and they are sued in their individual capacities (R. 3, 965, 972; App. 22). While the Bankhead Cotton Act was in effect, respondent Wallace was Secretary of Agriculture, and as such, promulgated the regulations and controlled the funds sued for here (R. 17, 972); respondents Davis and Payne were Administrator and Comptroller, respectively, of the

Agricultural Adjustment Administration; respondent Deal was, and it is believed that he still is, manager of the national pool; and respondent Julian was, and still is, Treasurer of the United States (R. 972-973, 976).

During the crop years mentioned above petitioners and the original plaintiffs chose to market the cotton which they had produced in excess of their respective allotments by purchasing the cheaper exemption certificates instead of paying the fifty per cent tax (R. 967). They secured their additional certificates from the national pool operated by respondents and paid for these additional certificates by checks made payable to "E. L. Deal, Certificate Pool Manager" (R. 356, 373, 412, 417) or "Certificate Pool Manager" (R. 244, 519, 739, 742, 833). The checks were drawn this way in accordance with instructions (R. 43, 148, 412, 975). Upon receipt of these checks the pool representatives in the various county offices (called Assistants in Cotton Adjustment; R. 565-566, 828-830, 896) delivered the purchased certificates (R. 977-981).

The checks used to purchase the certificates here involved were sent by these pool representatives to Washington, D. C., and were received by Deal (R. 129, 741, 743, 828, 877). The checks were then endorsed "Pay to the order of The Treasurer of the United States, [signed] E. L. Deal, Certificate Pool Manager", and were thereafter transmitted through Payne to Julian and deposited in the Treasury of the United States as "contributed trust funds" pursuant to § 20 of the Permanent Appropriation Repeal Act, 1934 (R. 244, 603-605, 612, 618, 626-627, 646-647, 748, 827-828, 833, 877, 977-978).

On January 6, 1936, the Agricultural Adjustment Act of 1933 was held to be unconstitutional, *United States* v. *Butler*, 297 U. S. 1, 56 S. Ct. 312, and that decision also determined the invalidity of the Bankhead Cotton Act (R. 989; App. 21). Thereafter, the original plaintiffs below on January 25, 1936, instituted this proceeding as a class action to recover the amounts they had paid to respondents for exemption certificates (R. 2-14). The suit sought to have a receiver appointed to hold the moneys paid to

respondents and a preliminary injunction to restrain disposition of the trust fund, and prayed that upon a final hearing they and those for whom the suit is prosecuted be declared to be the owners of the fund and entitled to receive the amounts which they have severally paid into the fund (R. 13-14, 968; App. 20).

At the time this suit was commenced and respondents were served, over $5,000,000 of pool funds (R. 497, 501-502) remained in the Treasury of the United States "under a special symbol number" as required by the trust agreements (R. 65). An additional $799,000 (including $784.00 paid by petitioner S. Carl Miller) was received by respondents and placed in the Treasury several months later (R. 567, 981, 984-985).

Following the issuance and service of a rule to show cause (R. 116), the respondents filed their verified return to the rule which admitted, for the most part, the allegations of fact in the complaint (R. 117-134).

Respondents' admission covering the relationship of the United States to these funds was in part as follows:

> * * * defendants admit that the amounts paid into said Pool through defendant Deal as trustee of said fund were not paid to any collector of internal revenue and were not paid to the United States. Defendants admit that plaintiffs have no remedy for, or right to, the return to the plaintiffs by the United States or by any collector of internal revenue of any part of said payments, and allege that said payments have no connection with and form no basis for any claim against the United States or any agent of the United States in his capacity as such agent, but that said payments were in substance *payments between private parties in a matter involving the transfer of property in which the United States Government had and has no proprietary interest* (R. 131; App. 21). (Emphasis by respondents.[3]

[3] A similar admission was made by respondents in their brief on the first appeal (App. 22); in their verified answer to plaintiffs' complaint (R. 203); in the sworn statement submitted to the Court of Claims (R. 874, 877); and in their representations to Congress (R. 886, 930; not received in evidence, R. 565-566, 828-830).

A few weeks later respondents filed their motion to dismiss (R. 180-181) which the District Court sustained (R. 181-182, 188).

The original plaintiffs noted an appeal in open court (R. 188) and respondents thereafter advised counsel for plaintiffs by letter of their intention to disburse the trust funds (R. 838-840.)[4] Plaintiffs replied to respondent Deal in part as follows:

> * * * we do not wish you to proceed to distribute the funds involved under any misapprehension as to the intention of plaintiffs to hold you and other defendants personally responsible in the event of reversal of the judgment of the lower court. (R. 836-837.)

A copy of this letter was also sent to respondent Julian (R. 835) and its receipt was acknowledged for him (R. 837).

Respondents thereafter distributed some $5,700,000 to the "under producers" (App. 20, footnote 2). A balance of approximately $116,000 now remains in the pool accounts (R. 985-987).

The Court of Appeals on its first consideration of the case reversed the District Court. *Thompson* v. *Deal*, 67 App. D. C. 327, 92 F. 2d 478 (App. 17-41). The majority opinion, four justices concurring, held that the suit was a proper class action (App. 24-25), that it was against the respondents individually (App. 22), that a court of equity had jurisdiction (App. 24), that plaintiffs had paid money to respondents under duress and coercion (App. 29), and that such duress and coercion was attributable to respondents (App. 30). One justice dissented (App. 31-41).

No certiorari being applied for, the case was returned to the District Court and respondents filed their verified answer, again admitting in general the facts alleged in the complaint (R. 193-206).

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[4] This correspondence was received in evidence subject to a ruling as plaintiff's exhibit 18. See the original certified record pp. 544-547, 986.

At a pretrial hearing sometime later respondents sought leave to amend their answer insofar as it admitted the payments alleged to have been made by plaintiffs (R. 213). Counsel for plaintiff consented and agreed to the taking of depositions in Mississippi (R. 364-365).

Prior to the taking of these depositions, a Mr. Jackson and two or three other investigators from the Department of Agriculture (R. 361) went to Greenville, Mississippi, and began investigating the operations of plaintiff Fisher (R. 360, 365-367, 373-374). Mr. Fisher first learned of this activity from some of his tenants (R. 359-360). While the payments made by plaintiffs were for the crop year 1935-36, those investigators said they had authority to, and would, tie up the distribution of all government funds for the crop year *1941*—not only those due plaintiffs, but also those due *every other farmer in the county* (R. 360-361, 373-374) unless this proceeding was withdrawn (R. 361, 371). Thus, the previously militant plaintiffs (R. 367, 369) were so threatened with financial (R. 360-362, 371) and criminal (R. 366, 371) complications as to be (in the words of their attorney) "utterly threatened out of the law suit" (R. 374)—a fact which the Court of Appeals voluntarily censured (R. 993, footnote 2).

Petitioners, who had been following the case (R. 369), immediately filed and served a motion to intervene (R. 214-215, 411). After this had been done an unsuccessful attempt was made the same day (after the Court's regular hours) to have the action dismissed on plaintiffs' motion by a justice in chambers (R. 217).

Following a subsequent hearing in open court petitioners were permitted to intervene (one without objection; R. 220-221), and the motion of the plaintiffs to dismiss was denied (R. 229-230).

Further prosecution of the case was then left to petitioners (R. 969, 972) who filed complaints (R. 222-227, 231-236) incorporating by reference practically the identical allegations as those contained in plaintiffs' complaint (R. 994).

After a trial on the merits of the case the District Court again dismissed the complaints (R. 990) which action the Court of Appeals affirmed on a second review (R. 996).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred as follows:

1. In failing to follow the law of the case as previously determined by it to the effect that this is a proper action against respondents individually and one in which the United States has no interest.

2. In denying a judgment for petitioners on the improvised ground that the fund involved was not available for payment to plaintiffs and to petitioners after having previously held that the original plaintiffs were entitled to recover from defendants personally.

3. In holding (even if the case should be decided on the present availability of the fund involved) that the Permanent Appropriation Repeal Act did not appropriate trust funds on deposit in the United States Treasury for payment to the contributors to the trust when the express trust fails.

4. In holding that it was without power to compel a restoration of the trust res.

5. In failing to find the balances in the pool accounts on January 31, 1936, and the amounts paid into the pool accounts after January 31, 1936.

6. In failing to receive in evidence as admissions against interest statements made by respondents in a Hearing Before a Senate Subcommittee.

7. In finding and holding that the payments made by petitioners and the other members of the class were commingled with the moneys of the United States.

8. In failing to award counsel fees to attorneys for petitioners.

9. In failing to give judgment for the petitioners, for the original plaintiffs, and for the other members of the class as prayed for in the respective complaints.

REASONS FOR GRANTING THE WRIT.

I

The Court should grant the writ to settle a direct conflict between the Court of Claims and the Court of Appeals concerning title to the trust fund here involved. In a contemporaneous case the Court of Claims overruled an allegation to the contrary and took judicial notice of the fact that the United States has no interest in the trust fund here involved. *Crain* v. *United States*, 96 C. Cls. 443, 454, 44 F. Supp. 321, 326, cert. den. 317 U. S. 667. The same holding was reached by the Court of Claims after a trial on the merits in *Brackin* v. *United States*, 96 C. Cls. 457, 468, 44 F. Supp. 327, cert. den. 317 U. S. 669.[5] Congress undoubtedly also concluded that the United States had no interest in these trust funds because it failed to appropriate funds to reimburse the class now before the Court (R. 995, footnote 3)[6] after it had previously reimbursed those cotton producers who paid the tax in cash to the United States. Second Deficiency Appropriation Act, Fiscal Year 1938 (Act of June 25, 1938, c. 681, 52 Stat. 1114, 1150-1151).

The Court below, however, after having once held that "here the government has no proprietary or possessory

[5] The *Brackin* case was presented to the Court of Claims on a Congressional reference pursuant to § 151 of the Judicial Code, 28 U. S. C. A. § 257, and that Court in denying direct liability on the part of the United States invited the attention of Congress to the instant proceeding. *Ibid.* at 44 F. Supp. 333.

[6] Cf. plaintiff's exhibit 91 (R. 883, 886) which was not received in evidence (R. 565-566, 828-830). The bill S. 963 never became law.

rights in the fund" (App. 24) has now held that the same fund is under the control of the United States and cannot be touched until "the United States shall submit to be sued to determine its disposition" (R. 994). The first holding of the Court of Appeals was based in part on certain admissions and the second (and contrary) holding was made despite the fact that exactly the same *admissions* were before the Court on the two appeals (Cf. R. 127, 131, and R. 201-202, 203). Obviously, the second holding by the Court below failed to follow "the law of the case". *Claiborne-Reno Co.* v. *E. I. DuPont DeNemours & Co.*, 8 Cir., 77 F. 2d 565; *H. P. Coffee Co.* v. *Reid, Murdoch & Co.*, 8 Cir., 60 F. 2d 387; *Anchor Stove & Range Co.* v. *Rymer*, 6 Cir., 97 F. 2d 689, cert. den. 305 U. S. 653. Cf. *Munro* v. *Post*, 2 Cir., 102 F. 2d 686, 688.

The last opinion of the Court of Appeals spotlights the Court's inconsistency. Thus, the Court states that its first opinion (App. 17-41) was based on "the pleadings *and admissions*" (R. 993) but that it could no longer sustain "the presumption which" it had "indulged on the previous appeal" (R. 994; italics supplied).

If the facts were admitted, however, there could be no presumption.

Furthermore, the facts as admitted by the pleadings were conclusive against respondents. *Nichols* v. *Bealmer*, 36 App. D. C. 352.

II

The Court should grant the writ to set at rest the status of numerous contributed trust funds which are deposited in the United States Treasury pursuant to § 20 of the Permanent Appropriations Repeal Act, *supra*, pp. 3-4. That section, besides authorizing such trust funds to be deposited in the Treasury, provides that—

> * * * all amounts credited to such trust-fund accounts are hereby appropriated and shall be disbursed in compliance with the terms of the trust * * *.

The Court of Appeals appears to have accepted as a fact the trial court's asserted finding (R. 988) that—

> * * * there is no Congressional authority for withdrawal of money from the Treasury under the pool appropriation accounts for payment to plaintiffs and intervenors * * *. (R. 994.)

This, it is submitted, is purely a question of law involving only the interpretation of the statutory language quoted above and is a question which this Court should pass upon in order to fix the rights of individuals to money in their government's Treasury to which the government makes no claim.

The effect of the holding below is to interpret § 20 of the Permanent Appropriations Repeal Act to mean that all such trust funds are appropriated *only* for the purposes of the express trust and that no appropriation exists where, as here, the express trust fails. From the opinion below it appears that the courts are powerless to determine title to a trust fund in the Treasury even though the United States makes no claim to the fund—either as owner or trustee. Such a decision, if allowed to stand, results in the unjust enrichment of the custodian (the United States) at the expense of the contributors to the trust who had every right to assume that the Treasury was acting merely as a banker or stakeholder.

Petitioners submit that the statutory language used shows plainly that Congress was disclaiming any proprietary interest in these trust funds. It follows that where the express trust fails the money remains appropriated to be returned to the contributors who are, in effect, the beneficiaries of a resulting trust. This interpretation of the statute is in accord with the legislative history of the Act. House Report No. 1414, 73d Cong., 2d Sess., p. 12 (discussing § 22 of the original bill). See also Appendix B of the Hearing before the Subcommittee of House Committee on Appropriations in charge of Permanent Appropriations,

73d Cong., 2d Sess., p. 961. (In its Report No. 1414, *supra*, p. 2, the House Committee called the attention of Congress to this Appendix.)

The ruling below in denying jurisdiction to the courts conflicts in principle with *Morgenthau* v. *Fidelity & Deposit Co. of Maryland*, 68 App. D. C. 163, 164, 94 F. 2d 632, which held that where the United States claimed no interest in the fund—

> * * * one who has an equitable right in the fund as against the payee may have relief against the officials of the Treasury through a mandatory writ of injunction or a receivership, so as to bind the payee and afford a proper acquittance to the government. As much as this was said in Houston v. Ormes, 252 U. S. 469, 40 S. Ct. 369, 64 L. Ed. 667.

III

The subject matter of this litigation is not only of importance to some 100,000 cotton producers (R. 995, footnote 3) who paid over $22,000,000 to respondents in trust (R. 985-988), but it is also of importance to many other persons who have or may in the future contribute funds in trust to be deposited in the Treasury pursuant to § 20 of the Permanent Appropriation Repeal Act. Certainly the labyrinth of Government accounting should not be permitted to result in the confiscation of a depositor's money.

IV

The Court should grant certiorari to resolve the holdings below with regard to a litigant's right to a money judgment even though the defendant is without funds with which to pay such a judgment. The Court below originally believed the availability of the trust res to be without significance holding in part that—

> * * * it is settled law that if money is illegally demanded and received by an agent he cannot exonerate himself from *personal* responsibility by paying it over

to his principal *when he has notice not to pay it over.* (App. 30; italics supplied.)

Since over $5,800,000 was in the Treasury of the United States on April 30, 1936 (R. 497, 501-502, 567), several months after the decision in *United States* v. *Butler, supra,* and the filing of this suit, and more than a month after respondents were notified not to distribute these funds (R. 836), and since respondents thereafter distributed these trust funds *on their own motion,*[7] it is believed that petitioners are entitled to a personal judgment against respondents for the amount of these funds which respondents have voluntarily dissipated.

Certainly petitioners' right to a recovery herein should not depend on the availability of a fund from which respondents can repay the money they gave away after the *lis pendens* of this suit. As the Court below has previously said, "* * * a plaintiff may have a judgment notwithstanding the defendant is execution proof". *Inland Waterways Corporation v. Hardee,* 69 App. D. C. 268, 274, 100 F. 2d 678, reversed on other grounds *sub nominee Inland Waterways Corporation* v. *Young,* 309 U. S. 517, 60 S. Ct. 646. To the same effect is this Court's holding in *Sloan Shipyards Corp.* v. *United States Shipping Board,* 258 U. S. 549, 568, 42 S. Ct. 386.

If, however, this Court should determine that such funds were disbursed by respondents as a proper function of their duties, the District Court can undoubtedly issue a certificate of probable cause to respondent Julian pursuant to the Act of March 3, 1863, c. 76, § 12, 12 Stat. 741, 28 U. S. C. A. § 842. Thus, the judiciary can itself overcome the imaginary hurdle of a proper appropriation.

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[7] This money was disbursed despite the fact that the Comptroller-General had refused to rule on the availability of the fund for payment to the original beneficiaries (R. 613-618, 937). Only the Comptroller-General has authority to pass on such questions. Act of July 31, 1894, c. 174, § 8, 28 Stat. 162, 208; Act of June 10, 1921, c. 18, § 304, 42 Stat. 20, 24; 31 U. S. C. A. § 74. 21 Op. Atty. Gen. 178, 25 Op. Atty. Gen. 301, 28 Op. Atty. Gen. 129.

CONCLUSION.

Since members of the class represented by petitioners have been denied a recovery in the Court below and also in the Court of Claims on the ground that the same money was and was not, respectively, under the control of the United States, it is respectfully submitted that this petition should be granted to resolve the differences between the holdings below as to the legal title to the trust fund here involved.

It is also believed that this Court should grant the writ to fix the rights of depositors of trust funds after their money has been placed in the United States Treasury and the express trust has failed.

Respectfully submitted,

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Attorneys for Petitioners.

January, 1945.

APPENDIX.

[Copy of opinion reported at 67 App. D. C. 327, 92 F. 2d 478]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6695

J. WOOD THOMPSON, A. W. FISHER, D. S. HOPSON, AND S. J. WARD SUING ON BEHALF OF THEMSELVES AND OTHER COTTON PRODUCERS SIMILARLY SITUATED, APPELLANTS,

v.

ERNEST L. DEAL, INDIVIDUALLY AND AS MANAGER OF THE NATIONAL SURPLUS COTTON TAX EXEMPTION CERTIFICATE POOL, 1935, HENRY A. WALLACE, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES, W. A. JULIAN, INDIVIDUALLY AND AS TREASURER OF THE UNITED STATES, ET AL., APPELLEES.

Appeal from the District Court of the United States for the District of Columbia

(Argued April 5, 1937—Decided June 28, 1937)

John C. White, of Washington, D. C., and *Jerome S. Hafter*, of Greenville, Miss., for appellants.

Robert H. Jackson, Assistant Attorney General, *Leslie C. Garnett*, United States Attorney, and *Sewall Key*, *F. A. LeSourd*, and *F. J. Neuland*, all of Washington, D. C., for appellees.

Before MARTIN, C. J., and ROBB, VAN ORSDEL, GRONER, and STEPHENS, JJ.

GRONER, J.: This is an appeal taken from a decree dismissing a bill in equity brought by appellants to recover amounts paid by them in purchasing exemption certificates issued under the Bankhead Act from the National Surplus Cotton Tax Exemption Certificate Pool. Some of appellants reside in Mississippi, others in Alabama. The suit was brought as a class suit in the United States District Court against Deal, the manager of the National Cotton Pool, a resident of the District of Columbia; Wallace, the Secretary of Agriculture; Julian, the Treasurer of the United State; and Payne and Davis, Comptroller and Administrator, respectively, of A. A. A.

The Bankhead Act was passed by Congress "to place the cotton industry on a sound commercial basis, to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, to provide funds for paying additional benefits under the Agricultural Adjustment Act, and for other purposes".[1] The Act was limited to the crop year 1934-35 unless extended by the President. It fixed the quota for the first year at 10,000,000 bales, and authorized the Secretary of Agriculture to determine the total to be produced in a subsequent crop year, and imposed a tax on all cotton produced in excess of the fixed allotment. The Secretary was authorized to allocate to each cotton producing state and county a fixed proportion of the permissible total and likewise to divide up the county total among individual producers of cotton. The tax, equal to $25.00 a bale, applied to all cotton produced in excess of the amount allotted. No allotment was made to any producer of cotton unless he agreed to comply with the limtiations on production prescribed by the Secretary, not only as to cotton but as to all other agricultural commodities. If he did comply, he was furnished with exemption certificates evidencing his right to produce and to gin free of tax the amount of cotton allotted to his farm. The certificates, if not thus used, were transferable or assignable in such manner as the Secretary might prescribe. Violations of the Act were made punishable by a fine not exceeding a thousand dollars and imprisonment not exceeding six months, and the Act authorized the Secretary to make such rules and regulations as in his opinion were necessary to carry the Act into effect, and violations of the Secretary's rules were made punishable by a fine not exceeding $200.00.

Pursuant to the authorization of the Act the Secretary issued regulations under date of March 6, 1935, in which he set up elaborate administrative machinery. So far as material here, the regulations provided for the establishment of surplus cotton tax exemption certificate pools. Broadly speaking, the purpose of these pools was to act as a clearing house for surplus exemption certificates, that is to say, the farmer who had failed to produce an amount of cotton equivalent to his certificate might turn the remainder over to the pool to be sold to a producer who

[1] 48 Stat. 598, amended 48 Stat. 1184, 49 Stat. 776.

wished to market cotton in excess of his allotment. Each producer surrendering certificates to the pool executed in triplicate a trust agreement appointing the manager of the pool as trustee "to hold all right, title, and interest which the producer may have in said certificates, listed below," and authorizing the manager of the pool "to place said certificates in said pool and give this producer credit for the amount of said certificates as shown below".—that is to say, the manager of the pool was authorized to sell the certificates and after the payment of all expenses to distribute the proceeds "pro rata to the producers who have contributed to the pool". The certificates were to be sold for cash or certified check payable to the pool manager at such price and under such conditions as the Secretary should determine. The price fixed was four cents a pound ($20.00 a bale). Under the provisions of the Act and the regulations a producer of cotton whose farm yielded a greater number of pounds than his allotment could market his surplus only by paying a tax of five cents a pound on the excess or by buying at four cents a pound certificates covering the amount of such excess.

Appellants allege that during the crop year 1935-36 (the President having extended the provisions of the Act) they received their allotments of cotton which might be produced tax exempt, but that they all produced more than the allotted amount. Four courses were then open to them:

(a) they could pay the tax of $25.00 a bale;

(b) they could obtain reissued certificates at $20.00 a bale;

(c) they could store their cotton subject to a government lien but not to be thereafter removed without payment of the tax or the purchase of the exemption certificates; or

(d) they could ignore the Act and be subject to the criminal penalties prescribed therein.

They alleged that they chose the least of the evils and purchased from appellee Deal, manager of the pool, sufficient tax exemption certificates to cover their excess cotton and that they were led to do this because the Secretary had fixed the price of the certificates at one cent less a pound than the tax. They alleged they paid into the pool some $8,500.00 and that there were in the United States not less

than one hundred thousand producers in like situation whose payments into the pool total in excess of three and a half million dollars. They say they made the payments under duress and that the money received by Deal from the sale of certificates, less the deduction of the expenses of the pool, is about to be distributed under the directions of the Secretary of Agriculture to the several persons who surrendered their certificates to the pool.[2] They base their suit upon the invalidity of the Bankhead Act and of the rules and regulations of the Secretary and conclude with the allegation that if the money is released and paid over to the individual producers, as it is about to be, tracing it would be impossible, and that a suit for recovery under R. S. 3226 will not lie because the money was not paid to a collector of internal revenue. They ask for the appointment of a receiver to hold the fund and for a preliminary injunction to restrain disposition of it, and pray that upon a final hearing they and those for whom the suit is prosecuted be declared to be the owners of the fund and entitled to receive the amounts which they have severally paid into it.

There was a motion to dismiss which was sustained by the District Court on the ground that the producers who had surrendered to the pool the certificates that appellants bought are the real parties in interest as beneficiaries of the trust fund; that these producers exercised no duress upon appellants and that the case is controlled by *Otis* v. *Cullum*, 92 U. S. 447. We think there is more to the case.

If the Bankhead Act and regulations are invalid, the depositors of the certificates into the pool have no rights which entitled them to the proceeds or to be made parties to the suit. Whatever rights these depositors had arose as a result of the Act and of regulations to make it effective. It is only through the power of the Act that the surrendered certificates had a value of four cents a pound or any value. If the Act and the regulations made by the Secretary are invalid, the farmer who surrendered a certificate had nothing to sell and is entitled to nothing in the distribution of the fund if the fund itself was created by duress. The

[2] Counsel for the government stated in the argument that all but a comparatively small part of the fund had been distributed during the pendency of this proceeding, but that enough had been retained to pay the claims asserted in this suit.

Bankhead Act was repealed February 10, 1936, following the decision in *United States* v. *Butler*, 297 U. S. 1, and we take is as settled for the purposes of this discussion—and indeed it was not otherwise contended in the argument and in the briefs by government counsel—that the decision of the *Butler* case invalidating the Agricultural Adjustment Act is controlling and that the Act now under consideration and the regulations made pursuant to it are, therefore, invalid.—So that the questions, as we think, for decision are:

> 1st, is this a suit against the United States?;
> 2nd, have the appellants a standing in equity?;
> 3rd, do the allegations of the bill show that this is properly a class suit?;
> 4th, were the payments made under duress?; and
> 5th, was duress attributable to the depositors of certificates?

1st. Contrary to our previous experience in suits against the Treasurer and other fiscal officers of the United States in which it is almost invariably insisted that the suit is one against the United States, we are met in this case with the flat-footed statement by the officers sued that this is not a suit against the United States. Thus in paragraph 28 of the return to the rule to show cause filed on behalf of Deal, Wallace, Julian, Payne, and Davis, they say:

> Further answering, defendants admit that the amounts paid into said pool through defendant Deal as trustee of said fund were not paid to any Collector of Internal Revenue and were not paid to the United States. Defendants admit that plaintiffs have no remedy for, or right to, the return to the plaintiffs by the United States or by any Collector of Internal Revenue of any part of said payments, and allege that said payments have no connection with and form no basis for any claim against the United States or any agent of the United States in his capacity as such agent, but that said payments were in substance payments between private parties in a matter involving the transfer of property in which the United States Government had and has no proprietary interest.

And in the brief filed on behalf of all the appellees and signed by Mr. Jackson, Assistant Attorney General, it is stated:

> This suit has no relationship or similarity to a suit against the government or its officers for the recovery of illegal taxes, penalties, or other levies that have been paid. The suit here is not against the United States, nor is it against a Collector of Internal Revenue who has collected any levies for the United States. The suit is directed against a fund in which the United States has no pecuniary interest whatsoever. A recovery in this proceeding will not be a recovery against the United States, but the effect of it will be a recovery against many individual cotton producers, not parties to this action, who in good faith deposited their property with a trustee for the purpose of sale. Although the appellees who were named as defendants in this action are officers of the United States, the bill makes clear that they are joined only by reason of their relationship to this fund in which the United States has no pecuniary interest. In so far as they handle this fund and in so far as the appellee Deal sold exemption certificates from the pool and deposited the proceeds in the fund, these appellees were representing not the United States but the individual cotton producers who deposited certificates in the pool, and the rights and duties of these appellees are as set forth in the trust agreements upon which the certificates were deposited. That this proceeding is in reality one between individuals who were parties to a purchase and sale transaction, rather than one against the Federal Government or its officers to recover taxes or penalties, is made clear by the appellants themselves in paragraph 28 of their bill.

From these extracts it is obvious that the plaintiffs sued the government defendants in their individual capacities and not as officials of the government in the performance of an official function and that the case has proceeded throughout on this theory, and we are of opinion that this position is correct. The trustee agreement under which the certificates were deposited required payment to the manager of the pool and stipulated in his behalf that after the payment of expenses he would distribute the fund pro rata

to those who were its intended beneficiaries. The case is, therefore, different from *Haskins* v. *Morgenthau*, 85 F. (2d) 677, for here, as we have seen, the money is entirely a private fund as to which the Treasurer is a mere custodian for private interests and the United States as such are strangers. It is not public money nor money subject to the appropriation of Congress, and therefore is not money which Congress can dispose of. In this view the principle announced by us in *Orinoco Co.* v. *Orinoco Iron Co.*, 296 F. 965, and affirmed by the Supreme Court *sub nomine Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, is applicable. That was a case arising out of a claim against a foreign nation which by the terms of a protocol had been paid into the United States Treasury as a trust fund for the beneficiaries. A dispute arose as to who was entitled to the fund. One of the claimants presented its claim to the Secretary of State who refused to recognize it or to order it paid out of the fund. Appeal was had to the courts in the District of Columbia, and the jurisdiction of the court was challenged on the ground that the decision of the Secretary of State was final, and it was argued also that the suit was one against the government and could not, therefore, be maintained. As to the last proposition, we said:

> The iron company is not seeking in this suit to recover anything from the United States. It is conceded, and properly so, that the money in question is held in the treasury as a trust fund. The government has no claim to it and it makes none. No matter what the outcome of the suit might be, the government would receive none of the fund. For this reason the suit is not against the United States, as argued by the appellants.

And in the recent case of *O'Connor* v. *Rhodes*, 79 F. (2d) 146 (affirmed, 297 U. S. 383), the same question arose involving a fund in many respects similar to that in the instant case. In that case there had been a deposit by the Fleet Corporation and by the Alien Property Custodian in a national bank which was secured by a deposit of government bonds and which was paid in full upon the failure of the bank. Suit was brought to recover the excess over the dividend paid to other creditors, and there it was insisted that the suit was against the United States. As to the alien property fund, we said:

> The fund is earmarked for a special purpose in the hands of the Attorney General, as the acting Alien Property Custodian, and no interests of the United States would be affected by a decree in the suit. The fact that Congress has authorized the fund to be used for purposes of the Alien Property Custodian's office does not change its character or the rights of the parties.

And so we held it was not a suit against the United States.

We think it clear that in this case as in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, the suit is not one in which the court is asked to interfere with the official discretion of a government officer. Its entire purpose is to challenge the authority of certain government agents to distribute improperly, as appellants claim, a fund in which they have an interest and in which the government has none,—as it is clear, we think, that here the government has no proprietary or possessory rights in the fund. It is also clear that under the authorities we have cited the court may impress an equitable lien on the money and order its return to equitable owners. See *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *German All. Ins. Co.* v. *Van Cleve*, 191 Ill. 410.

2nd. The bill charges that the officials of the A. A. A. are about to turn over the pool money to the so-called beneficiaries and that in that case it would be impossible to trace it into the hands of the recipients,—and in that case appellants would have no recourse either by assumpsit or otherwise. In addition to this, the agreement under which the deposit was made authorized the deduction of expenses for administering the pool. This in itself necessitates an accounting in equity, certainly as the best way of determining for what amount, if anything, the holder of the fund is required to account. These facts, we think, were sufficient to give a court of equity jurisdiction.

3rd. Nor do we think there is any point in the objection made, but not strongly urged, that this is not properly a class suit. Here each of the appellants and every other person similarly situated has an identical interest in a single fund. Each bears the same relation to the fund, and a disposition of the case as to one will decide the rights of all. Appellants say the suit is not brought to rescind a

contract of sale, but to restrain the completion of an unlawful statutory scheme participated in by appellees and by the depositors in the pool agreement to take appellants' money for the benefit of the depositors, and that the suit is brought to enjoin the further dissipation of trust funds belonging to appellants, to prevent appellees from paying such fund to innumerable persons not entitled to it, and thereby placing the fund beyond their reach.

We think the suit is in the nature of an action to impress a fund with a trust and compel its restoration, and we think it is properly brought as a class suit. Here there is an identity of parties and an identity of interests; if one of the appellants can recover, all can recover, and if they do not proceed as a class there must then be a multiplicity of suits. The governing rule is stated in *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662-672, and *Watson* v. *National Life & Trust Co.*, 162 F. 7.

4th. The argument on behalf of the government is that appellants were not coerced into doing business with manager Deal. Counsel say that officer could not compel appellants to purchase certificates from the pool, that appellants could just as well have complied with the tax provisions of the Act, and in that case would have had recourse against the United States for the recovery of the taxes if the exaction was shown to be invalid. From these facts they draw the conclusion that appellants' purchase of pool certificates was due to their own voluntary desire to avoid payment of the tax and thus to save money. This, they say, is not duress. Summarized, the argument is that appellants are not seeking the recovery of money wrongfully exacted by the government or by some party acting in behalf of the government who has exerted compulsion upon them, but are seeking to recover money paid to entirely innocent third parties who gave to appellants in return for their money property rightfully belonging to those third parties. But we think this contention cannot be sustained. The government had no right to limit the production of cotton or to use the taxing power exclusively to accomplish that end. We are not saying that a tax on the processing of cotton is objectionable; but the Bankhead Act did not impose a true tax and was not designed to raise revenue. It was—as it was intended to be—only a coercive measure supplemental to the Agricultural Adjustment Act.

The duress situation which the Supreme Court found to exist in the Act challenged in *United States* v. *Butler* is as apparent here as there. And as to the provisions of the Act there, the Court said:

> The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remains a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present Act. . . . This is coercion by economic pressure. The asserted power of choice is illusory.

Here the plan, as we have shown, was to control the amount of production. At ten cents a pound, which until the recent advance was considered a fair return to the farmer, the tax imposed by the Act was equal to 50% of the value of the cotton produced. This was itself confiscatory. No farmer, therefore, was in position to refuse to sign the agreement which the Act required and to accept his allotment as the Secretary made it. Having accepted the allotment and by good husbandry and diligence, or by the fertility of his land, grown and harvested a crop in excess of the allotment, he was faced with the alternative of paying to the government in the form of a tax half the value above the allotment, or purchasing certificates at a sacrifice of two-fifths. Failing one or the other of these courses, he could not sell his cotton without subjecting himself to the penalty of fine and imprisonment.

Whatever may have been the old rule as to the characteristics of duress and coercion, a more liberal view prevails—and ought to prevail—today,—a change of viewpoint which has arisen as government has extended its control over the domestic concerns of the citizen. The Supreme Court of Wisconsin[3] has expressed this better view as follows:

> The old rule that there could be duress only where there was a threat of loss of life, limb, or liberty has been so changed that duress may sometimes be implied when a payment is made or an act performed to prevent great property loss or heavy penalties when there seems no adequate remedy except to submit to an unjust or illegal demand and then seek redress in the courts.

We are not unmindful of the rule that ordinarily when money has been voluntarily paid with full knowledge of the facts it cannot be recovered on the ground the payment was made under a misapprehension of the legal rights and obligations of the person paying. But we think this rule has no present relevancy for, as Mr. Justice Clifford said in *United States* v. *Ellsworth*, 101 U. S. 170,—in a very clear case of what many courts would have called a voluntary payment made under misapprehension of legal rights—

> Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner.

We might prolong this discussion indefinitely, for the books are full of cases on the subject, but this would avail us nothing since, as we think, the question we have asked is answered in principle by the Supreme Court in *Union Pacific R. Co.* v. *Pub. S. Commission*, 248 U. S. 67. That was a case concerning the validity of a charge made by the public service commission of Missouri for a certificate authorizing the issue of bonds secured by a mortgage on the lines of the Union Pacific Railroad. There was a state statute against the issue of such bonds without the authority of the commission and the imposition of penalties, and the

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[3] *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Railroad Commission*, 183 Wis. 47, 197 N. W. 352.

bonds were unmarketable without the certificate. The railroad applied to the commission for the certificate, and the commission granted it and charged a fee of ten thousand odd dollars. The railroad protested on the ground that the exaction was an interference with interstate commerce. The railroad appealed to the courts for the recovery of the fee, but was denied relief in the Supreme Court of Missouri. The case went to the Supreme Court of the United States which held the tax to be an interference with interstate commerce, and on the question whether it was recoverable notwithstanding the application was voluntary, as the State Court held, Mr. Justice Holmes speaking for the Court, said that this was a question of fact which the Supreme Court was authorized to examine for itself and—

> On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the charactertistic of duress properly so called. The Eliza Lines, 199 U. S. 119, 130, 131. If, as may be, the Supreme Court of the State regards or will regard this statute as inapplicable, *Public Service Commission* v. *Union Pacific R. R. Co.*, 271 Mo. 258, probably the State would not wish to retain the charge, but we repeat, the railroad company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law. *Atchison, Topeka, and Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280, 286.

We think it is manifest from what is said in the case just cited that the question of whether a payment is voluntary or involuntary has been in large measure relieved of the

artificial tests formerly applied by some courts. Here the payment was made under such an urgent necessity as to imply that it was made under compulsion; and this brings us to the final question in the case, namely, whether in order to recover appellants must show that the compulsion or coercion came from the parties who had deposited certificates in the pool.

5th. It is insisted by appellees that there can be no recovery because the depositors in the pool were not the persons who exerted the duress or committed the acts which compelled the payment, and *Chesebrough* v. *United States*, 192 U. S. 253, and *U. S.* v. *Cuba M. S. S. Co.*, 200 U. S. 488, are cited to sustain the proposition. We have given due consideration to the rule laid down in those cases, but we think it has no application here. To the contrary, we think there are proper grounds on which the right of recovery can be sustained:—

Appellee Deal occupied a dual relationship. He was an agent of the government and in the eyes of appellants he was the government, and he was also trustee of the depositors in the pool. He was appointed by the Secretary of Agriculture pursuant to authority vested in him by Congress, and by like authority, plus the consent of the depositors, he became the agent of the latter. He received their certificates pursuant to an agreement to sell them in accordance with the provisions of the law and to account to them for the proceeds. In this view it cannot be contended, we think, that in applying the compulsion of an invalid law, of which the depositors were to be the beneficiaries, he was not in fact their agent. On the other hand, as the agent of the government he was an instrumentality of the taxing statute. In short, he was an inseparable part of a common purpose, the purpose itself being unlawfully to provide benefits and bonuses to cotton farmers. It would be manifestly incorrect to say that the Act did not compel the purchase of certificates, for both purchase and sale were immediately necessary to all concerned,—necessary to the purchasing farmer in order that he might realize more or suffer less on account of his industry, necessary to the government in order that its plan of benefits and gratuities might be consummated, and necessary to the depositor in order that he might obtain the benefits.

In the situation we have here Deal was at once the representative of the coercive force by which payment was compelled and the representative of those who were the intended beneficiaries of the payments. In such a case the compulsion was as much the act of the depositor as if there had been no intervention of a third party.—Granted the duress, the depositor acting through the pool which made it effective, ought not to escape the consequences on the ground that not he but his agent applied the compulsion.

It is an ancient maxim of the law that what is forbidden to a person to do himself he cannot do by the agency of another. And so it has always been held that an agent who receives money for his principal is liable so long as he stands in his original situation and until there has been a change of circumstances by his having paid over the money to the principal. This rule was recognized in *Elliott* v. *Swartwout*, 10 Pet. 137, where it is said that it is settled law that if money is illegally demanded and received by an agent he cannot exonerate himself from personal responsibility by paying it over to his principal when he has notice not to pay it over. Here the depositors in the pool were in a wholly different position from that of the bank in *Otis* v. *Cullum*. They actively participated in the plan sought to be carried through by the provisions of the Bankhead Act. They agreed to be bound by its terms. They obtained their certificates by virtue of its provisions, and they turned them over to the pool to be sold for their benefit, equally by virtue of its provisions; and when payment for them was exacted by coercion the law implied a promise to make restitution and both the agent and the principal are liable on that promise. And so when Deal, acting under an invalid law, coerced payment for the certificates, we think it is well settled that a suit may be sustained against him to recover back money which he has in his possession and to which his principal has no legal claim.

The situation here is not wholly unlike that in *Osborn* v. *Bank of the United States* (*supra*). There the question was whether the court ought to make a decree against the officers of Ohio who had the money taken from the Bank, that is to say, whether they were to be considered as having a real interest or as being merely nominal parties. The Supreme Court had already decided that the Bank had a constitutional and legal existence and enjoyed exemption

from taxation. In that view the taking by the State officers of the property and money of the Bank was without justification. The decision was that the taking did not change the title and that the court might arrest the money before it was put out of their posession and restore it to the rightful owner.

Analogous cases are of frequent occurrence. A sheriff sometimes makes a seizure with process from a court without jurisdiction, or when the judgment is rendered without citation. A collector of customs charges duties upon merchandise on the free list, or imposes an excessive duty. A court appoints an administrator upon erroneous information as to the death of the supposed decedent. These officers are in each case personally liable at law, without reference to the persons interested in the orders or who had procured them. A person interested as owner in each case, when there are facts of mischief and injury may resort to equity.

Here the fund is admittedly under the control of appellees, admittedly also they are about to distribute it under the provisions of the pool agreement to persons who legally have no valid claim to it. To say in such circumstances that their action may not be arrested and the money restored to those from whom it has been illegally exacted, is to admit a wrong without a remedy and this, we think, is not the case.

Reversed and Remanded.

STEPHENS, *Associate Justice:* I dissent. Assuming the correctness of the ruling of the majority that the suit is properly brought in equity and is properly a class suit, still I think there can be no recovery by the appellants for the following reasons:

1. The suit, in my opinion, is against the United States, and the United States not having consented to be sued, it must for that reason fail. Against whom a suit is brought "is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered . . ." in the case. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. The result of the decree which will be entered if the appellants prevail in the instant case will be to compel the payment to the appellants by the Treasurer of the United States of moneys

now in his custody in the United States Treasury, moneys which reached his custody by virtue of an act of Congress and regulations promulgated thereunder having the force of law, moneys which under such act and regulations are to be disbursed to those who deposited certificates in the pool.

I am unable to agree with the distinctions taken by the majority in respect of *Haskins Bros. & Co.* v. *Morgenthau*, 66 App. D. C. 178, 85 F. (2d) 677, certiorari denied 299 U. S. 588. On the contrary, I think that case clearly determines that a suit brought against the Treasurer of the United States to compel him to pay out money in the United States Treasury in a manner contrary to that directed by Congress is a suit against the United States. In the *Haskins* case the appellants sought to recover moneys paid under an allegedly unconstitutional revenue act applicable to the first domestic processing of Philippine coconut oil. There the suit was against the Secretary of the Treasury, the Treasurer and the Comptroller General of the United States. The moneys in question had reached the hands of the Secretary of the Treasury and the Treasurer as a result of the act of Congress, and as a further result of the act had been earmarked in a separate fund for the benefit of, and to be paid over to, the Philippine Islands. The United States claimed no interest in the fund, except upon a contingency which had not arisen. We held in the *Haskins* case that the suit must fail. We said:

> First. We think the suit is in effect one against the United States. It is brought against the Secretary of the Treasury, the Treasurer, and the Comptroller General in their official capacities. It seeks to compel the payment of money now deposited in the United States Treasury. In this view the United States are necessary parties and, since they have not consented to be sued, the suit against the officers of the United States cannot be maintained. *We know of no power in this or any other court to compel the Secretary of the Treasury or the Treasurer of the United States, in a suit brought against them in their official capacities, to pay out money in the treasury in a manner contrary to that directed by Congress.* We hold these general principles to be axiomatic:
>
> First, that an act of Congress is necessary for the withdrawal of money from the public treasury;

Second, that no suit can be brought to enforce the making of an appropriation;

Third, that the Secretary of the Treasury and the Treasurer are officers of the United States holding offices established by law; that their duties are to receive and preserve the public money and not to disburse it except conformably to law; that as officers of the United States they have no right or estate in the public money or any other money in the treasury, whether earmarked as a special fund or as part of the general fund of the United States; that they are in effect mandataries of a limited and defined commission;

Fourth, that where an obligation is cast upon a principal and not upon his agent, a court cannot enforce it against the agent as long as he is acting wholly as agent.

In the instant case *it is therefore of no consequence whether the act under which the tax was collected be constitutional or unconstitutional. The fact that the tax has been collected and deposited in the treasury by the collecting officials of the government renders the custodian of the fund impotent to withdraw the money and disburse it unless and until directed to do so by an act of Congress or until the United States shall submit to be sued to determine its disposition.*

It is equally of no consequence that the bill alleges that the fund belongs to appellant and others similarly situated. It is not in the hands of the officers but in the treasury, and though earmarked as a special or trust fund, has been mingled with the moneys of the United States. The purpose of the bill, therefore, is to coerce the United States, through their officers, to pay out money in the treasury as to which Congress has limited the power of withdrawal to the payment to the Philippine government. To permit this, would be to usurp the legislative function of appropriation, to substitute a court for the executive officers of the government, and to supplant by an order of court the duty and obligations imposed upon them by their oaths of office. *It is therefore of no moment whether the United States have the use of this money as they do the ordinary revenues of the government or whether the money represents a trust fund created by Congress and earmarked for a specific purpose. In either case it is*

money in the Treasury of the United States as to which the United States had and have the power of control and disposition.

It is incorrect, therefore, to say that the authority and duty of the United States depend alone upon their pecuniary interest. [Italics supplied] [66 App. D. C. 178, 85 F. (2d) at 680-681]

The instant case is, I think, on all fours with the *Haskins* case. Just as in the *Haskins* case the moneys reached the custody of the Secretary of the Treasury and the Treasurer as a result of an act of Congress, so in the instant case the proceeds of the pool are in the custody of the Treasurer as the result of an act of Congress and of regulations having the effect of law promulgated thereunder. Just as in the *Haskins* case the fund was earmarked to be paid over to the Philippine Islands, so in the instant case it is earmarked to be paid over to the depositors in the pool. Just as in the *Haskins* case the United States had no interest in the fund, so they have none here. Just as in the *Haskins* case the moneys were to be paid to the Philippines by virtue of an act of Congress, so in the instant case the fund was to be paid to the depositors in the pool as a result of the Bankhead Act and the regulations promulgated thereunder. Just as in the *Haskins* case the appellants asserted a right to recover the moneys because of the unconstitutionality of the revenue act, so in the instant case the claim of the appellants is based upon the asserted unconstitutionality of the Bankhead Act. As we ruled there, so I think we must rule here, that: "We know of no power in this or any other court to compel the Secretary of the Treasury or the Treasurer of the United States [in the instant case the Treasurer, the Secretary of Agriculture and the pool manager], in a suit brought against them in their official capacities, to pay out money in the treasury in a manner contrary to that directed by Congress."

I cannot agree that *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, and *Houston* v. *Ormes*, 252 U. S. 469,[1] are contrary to the views I express. The real basis of the holding of those cases is not, as I read them, that because the United States claim no interest in a fund which is in the United States Treasury, the Treasurer may be compelled by a court to

[1] Not cited in the majority opinion.

pay it out in a manner contrary to that directed by Congress. If that were the real basis of those cases, then the *Haskins* case should be overruled. In *Mellon* v. *Orinoco Iron Co.* and *Houston* v. *Ormes* funds in the possession of the Secretary of the Treasury and the Treasurer of the United States were, by virtue of an Act of Congress, to be paid to certain persons. In the *Orinoco* case the fund had been furnished by Venezuela; in the other, by Congress; in both cases the United States claimed no interest in the fund. The suits were in equity to subject the fund, as against the person designated by the act to receive it, to an equitable claim, and the essential theory under which the Supreme Court of the United States allowed recovery is, as I understand the decisions, that the payment of a fund to the person designated by an act of Congress to receive it is a ministerial duty the performance of which can be compelled by mandamus, and that from this it is a necessary corollary that one who has an equitable right in the fund, as against the person designated, may have relief against the Treasury through a mandatory writ of injunction or receivership, making the person designated a party so as to bind that person, and so that the decree may afford a proper acquittance to the Government. It is too well settled to require the citation of authority that a suit to compel an officer of the United States to perform a ministerial duty is not a suit against the United States requiring their consent to be sued. As I understand the two cases they do no more than recognize that a public officer may be compelled to an equitable, as well as to a strictly legal, performance of a ministerial duty. In the two cases in question the claim asserted was one asserted through the right of the person designated in the act to receive the money; in the instant case the claim of appellants is asserted in derogation of the right of those designated in the act and regulations to receive the money.

I am further not able to agree with the view of the majority that the suit is not a suit against the United States because the appellees admit in their return to the rule to show cause that the amounts paid into the pool through the appellee Deal as trustee of the fund were not paid to any collector of internal revenue and were not paid to the United States. At this point in the return factual differentiation of the payments from taxes as such was being made, and it was thus being denied that the amounts paid into the

pool constituted exactions, and being asserted that they were not being paid to any collector of internal revenue or to the United States, *i. e.*, as taxes. If the contents of the return were intended to mean that the moneys in question have not been paid to the Treasurer and are not now in the Treasury of the United States, then I think they must be disregarded because the case is before us on motion to dismiss the petition of the appellants and this motion admits the well pleaded allegations of the petition, and in paragraph 22 of the petition it is alleged that the manager of the pool, to whom the moneys in question in the suit were paid by the appellants and other producers of cotton in like situation, "has deposited same with the defendant Treasurer under a special symbol number, . . ." I think also that the admission of counsel for the appellees in their brief that the suit is not one against the United States cannot bind the court. Whether a suit is or is not one against the United States is a jurisdictional question, and if it is such a suit here, then the United States have not consented to be sued and there is an absence of necessary parties without the presence of which the court has no power to proceed. In paragraph 4 of the petition it is stated that the defendant [appellee] Julian "is the Treasurer of the United States, and is sued individually *and in his capacity as such Treasurer.*" [Italics supplied] The prayer of the petition seeks "a direction to the defendants or to the receiver of this court to pay over to plaintiffs. . . ." In view of this and of the admission by the motion to dismiss of the assertion that the moneys are deposited with the Treasurer I see no escape, under the *Haskins* case, from the conclusion that the instant suit is one against the United States. It is of interest to note that in their motion to dismiss the petition, appellees asserted, among other grounds of the motion, that the suit as against the Treasurer, the Secretary of Agriculture, the Comptroller of the Agricultural Adjustment Administration, and the Administrator of the Agricultural Adjustment Administration "is essentially one against the United States, which may not be sued without its consent, and has not consented to be sued herein."

2. Even if the view of the majority that the suit is not one against the United States be taken as correct, still I think the appellants cannot recover. If the suit is not one against the United States, then it must be one against the

depositors, through their agents, for the ultimate effect of the decree will be to withhold from the depositors the moneys in question and pay them over to the appellants. The suit is founded upon duress. On the topic of duress I understand the majority to reason thus: Under *United States* v. *Butler*, 297 U. S. 1, and *Union Pacific R. R. Co.* v. *Public Service Comm. of Missouri*, 248 U. S. 67, the Bankhead Act and the regulations promulgated thereunder constitute an unconstitutional legislative plan of economic coercion to control agricultural production; the purchase of certificates from the pool by the appellants was involuntary, compelled as the choice of the least of several evils. The duress thus found by the majority is clearly, in my view, a duress imposed by the Government, not by the depositors of certificates in the pool. This was the theory of the appellants in their petition, and in their briefs. In paragraph 26 of the petition they state that "in paying their money into said Pool they did so because of the coercion and duress imposed upon them by the said Bankhead Act, the said regulations issued thereunder and actions of said defendants taken in pursuance thereof. . . ." The reference to the defendants [appellees] is I think obviously a reference to the defendants as officers of the United States acting as such in pursuance of the Bankhead Act and the regulations. In their brief appellants say: "The compulsion flowed from the Bankhead Act and from the regulations promulgated by the Secretary of Agriculture under the authority of the act, which were a part of the act itself. The Pools were creatures of the regulations, and being such, were creatures of the act. They were, in legal effect, created by the act and were a part of the machinery of the act. The Bankhead Act, the regulations of the Secretary of Agriculture under the act, and the Pools created by the regulations were all part of one and the same plan. The compulsion flowed from the Act and the agencies created under the Act." The appellants' petition, as I read it, does not charge that the duress was imposed by the depositors of the certificates, or by their agents acting in private capacity, nor does it charge, as I read it, that the depositors, or their agents acting in private capacity, were participators in the duress of the statute and the regulations, or sharers in any unconscionable sense, as compared with the appellants, in the fruits of the duress. On the contrary I think it appears, under the facts as pleaded in the

petition, that those who deposited certificates in the pool were as much the subject of the economic pressures of the Bankhead Act—as the Act and its pressures are characterized in *United States* v. *Butler, supra*—as were those who purchased certificates from the pool. Section 6 of the Bankhead Act provided that no certificate of exemption should be issued and no allotment made to any producer unless he agreed to comply with the conditions and limitations on production prescribed by the Secretary of Agriculture.[2] Both the depositors of the certificates in the pool and the purchasers of certificates from the pool were seeking to realize, out of the legal-economic situation held in *United States* v. *Butler, supra*, to have been created by the Agricultural Adjustment Act and the Bankhead Act, on what they possessed. The certificate depositors were seeking to realize on certificates, for which they had no cotton; the certificate purchasers were seeking to realize on cotton, for which they had no certificates. Neither were, in any realistic sense, parties to the duress. The depositors of the certificates had as much or as little knowledge of the

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[2] In terms Section 6 provided:

"A producer of cotton desiring to secure a tax-exemption certificate may file an application therefor with the agent designated by the Secretary of Agriculture, accompanied by a statement under oath showing the approximate quantity of cotton produced on the lands presently owned, rented, share-cropped, or controlled by the applicant during a representative period fixed by the Secretary of Agriculture, and also the number of acres of land in said lands in actual cultivation for the three preceding years, and the quantity of cotton, in the best judgment of the applicant, said lands would have produced if all the cultivated land had been planted to cotton. Said application shall state any other facts which may be required by the Secretary of Agriculture. No certificate of exemption shall be issued and no allotment shall be made to any producer unless he agrees to comply with such conditions and limitations on the production of agricultural commodities by him as the Secretary of Agriculture may, from time to time, prescribe to assure the cooperation of such producer in the reduction programs of the Agricultural Adjustment Administration and to prevent expansion on lands leased by the Government of competitive production by such producer of agricultural commodities other than cotton and the allotment of and certificates of exemption issued to any producer shall be subject to revocation on violation by him of such conditions and limitations, and no criminal penalties shall apply to the violation of this provision." [48 Stat. 601]

unconstitutionality of the Act as the purchasers. The theory of the Supreme Court in the *Butler* case is, I think, that of a duress directed at all cotton producers, and hence as much at those who deposited certificates in the pool as at the ones who purchased certificates from the pool.[3]

The appellants themselves apparently recognize that the suit, to be well founded, must be against those who imposed the duress found in *United States* v. *Butler, supra*, to have been imposed, for they say in their brief, after asserting the unconstitutionality of the Bankhead Act under the *Butler* case: "It therefore follows that if the penalties paid by appellants were made under duress and that such duress *flowed from the one from whom recovery is sought*, such penalties can be recovered." [Italics supplied] For this they cite *Union Pacific R. R. Co.* v. *Public Service Comm. of Missouri, supra*, wherein the duress was that of the statute of Missouri and of the Public Service Commission of Missouri acting under the statute, and wherein the recovery was had against the latter—there being apparently no impediment in Missouri to the suit against the State through its agency, the Commission. If the depositors of certificates did not impose the duress, and did not participate in its imposition, then the only basis upon which recovery

[3] See *United States* v. *Butler*, 297 U. S. 1, 70-71:

"The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remained a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the Bankhead Cotton Act, used the taxing power in a more directly minatory fashion to compel submission. This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present act. It is clear that the Department of Agriculture has properly described the plan as one to keep a non-cooperating minority in line. This is coercion by economic pressure. The asserted power of choice is illusory."

against them could be allowed would be that they shared in the fruits of the duress in such manner as to make it unconscionable for them to prevail, as against the appellants. And in respect of this, if my analysis above set forth is correct—that they were as much the subject of the economic pressures as the appellants—then the equitable situation of the depositors and the purchasers is the same. In such a situation those having the prior legal right should, under familiar doctrines of equity, prevail. And if this suit is against the depositors, or their agents in private capacity, then the legal right is in them because the moneys are in their possession—that is, the possession of the agents in private capacity.

Characterizing in somewhat more general terms what seem to me to be the essential errors in the views of the majority: On the facts, in reasoning to the infliction of a substantive wrong upon the appellants, the majority have, I think, looked upon the wrong as one inflicted by the Government, but in reasoning to the existence of a remedy, the majority seem to me to have looked upon the wrong as one which the depositors inflicted or participated in inflicting, or as one of which the depositors in some inequitable manner received the fruits. And on the law I think that the majority have carried beyond its proper application the maxim "equity will not suffer a wrong to be without a remedy." It is so well settled as not to require the citation of more than general authority that "the maxims, that 'every right has a remedy,' and that 'where the law does not give redress equity will afford relief,' however just in theory, are subordinate to positive institutions, and cannot be applied either to subvert established rules of law, or to give the courts a jurisdiction hitherto unknown." 10 R. C. L., Equity, § 129, p. 379. And the maxim "equity will not suffer a wrong to be without a remedy" is not safely to be followed in respect of a wrong asserted to have been imposed by the Government. The United States have consented, by virtue of Rev. Stat. §§ 3220, 3226, as amended, to submit to suits for the refund of taxes erroneously collected, but they have not consented, by any statute to which we are referred or of which I am aware, to submit to suits for the refund of moneys paid for such certificates as are involved in the instant case. The majority reason that: a substantive wrong was inflicted upon the appellants through the economic pressures of the Bankhead Act; had the ap-

pellants chosen to pay the tax imposed by the Act instead of purchasing certificates, they could have recovered the tax under the statute referred to; payment for the certificates was in the nature of a penalty; therefore, by a parity of reasoning, and under the maxim "equity will not suffer a wrong to be without a remedy" the appellants may recover the payments for certificates.

Conceivably if under the Bankhead Act the Government inflicted a wrong, it should have created a remedy, by submitting itself to suit in respect of certificate payments, as it has concerning erroneous collection of taxes. But to create such a remedy is for the Congress, not for the courts; and the sin of omission of the Congress, if there be such, ought not be visited upon the depositors of certificates. The Congress not having seen fit to provide a remedy in respect of certificate payments, I think the courts should, as between the depositors of certificates and the appellant purchasers thereof, both of which groups were in my view equally subject to the asserted duress and equally innocent thereof, leave the loss where it has fallen and the moneys where they are.

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No. 864

In the Supreme Court of the United States

OCTOBER TERM, 1944

B. H. ROBINSON, LOWRANCE BROTHERS AND COMPANY, INC., A CORPORATION, LYNN W. MCNEILL, ET AL., SUING ON BEHALF OF THEMSELVES AND OTHER COTTON PRODUCERS SIMILARLY SITUATED, PETITIONERS

ERNEST L. DARR, HENRY A. WALLACE, W. [illegible], JUDSON, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF [illegible] FOR THE [illegible] CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 854

R. H. ROBINSON, LOWRANCE BROTHERS AND COMPANY, INC., A CORPORATION, LYNN W. MORRILL, ET AL., SUING ON BEHALF OF THEMSELVES AND OTHER COTTON PRODUCERS SIMILARLY SITUATED, PETITIONERS

v.

ERNEST L. DEAL, HENRY A. WALLACE, W. A. JULIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The first opinion of the District Court of the United States for the District of Columbia, dismissing the original plaintiffs' petition for failure to state a claim on which relief could be granted, is not reported (R. 181–182). The opinion of the United States Court of Appeals for the District of Columbia, reversing the District Court

and remanding the case for trial on the merits, is reported in 92 F. 2d 478.

The opinion of the District Court of the United States for the District of Columbia, after trial on the merits under petitioners' complaints in intervention (R. 965–970), is reported in 49 F. Supp. 366, and the opinion of the United States Court of Appeals for the District of Columbia, on appeal from the final judgment of the District Court dismissing the action on the merits (R. 992–995), is reported in 145 F. 2d 382.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on October 23, 1944 (R. 996). Petition for a writ of certiorari was filed on January 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

1. Whether, in an action against former officers of the Department of Agriculture as individuals and the present Treasurer of the United States as an individual, the Court could effect withdrawal, by them, of money from the Treasury of the United States for payment to cotton producers to

[1] It will be apparent from the statement and argument that the questions stated in the petition (p. 3) are not presented by this record.

the extent of the amount paid by the producers for so-called surplus cotton tax-exemption certificates issued under the Bankhead Cotton Act.

2. Whether such officer and former officers became and are personally liable to producers for the amount of the cashier's checks, delivered without protest to an agent of the United States not a party to the suit in exchange for surplus cotton tax-exemption certificates issued under the Bankhead Cotton Act, where collection of the checks was effected by the United States in the absence of any notice of claim by the producer with respect thereto, and the proceeds were covered into the Treasury of the United States.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The pertinent constitutional provision and statutes will be found in the Appendix, *infra*, pp. 21–23.

STATEMENT

J. Wood Thompson, A. W. Fisher, D. S. Hopson and S. J. Ward, as plaintiffs,[2] began a class suit in the District Court of the United States for the District of Columbia against the defendants on January 25, 1936, and filed their bill of complaint as a bill in equity, in which, on behalf of themselves and all other producers of cotton similarly situated, they sought relief on account of money

[2] Hereafter in this brief the petitioners will be referred to as intervenors; the original plaintiffs as plaintiffs; and the respondents as defendants.

alleged to have been paid in connection with a so-called "Surplus Cotton Tax-Exemption Certificate Pool 1935", established and operated under the Bankhead Cotton Act.[3] The relief sought, based on the claimed invalidity of the Bankhead Act, was that the defendants be enjoined from distributing a fund alleged to be in the possession and control of the defendants and to compel its distribution under court order. (R. 1–14.)

Before being required to answer, the defendants filed a motion to dismiss which was sustained by the District Court and the court thereupon entered its order dismissing the action (R. 180–181, 188). The plaintiffs appealed to the United States Court of Appeals for the District of Columbia. A restraining order pending appeal was applied for and denied (R. 182, 187–188). On appeal, the Court of Appeals reversed the District Court's order of dismissal and remanded the case for trial on the merits.[4] After remand, an answer was filed on behalf of the defendants (R. 193–206) and thereafter the plaintiffs filed their motion for dismissal of the action without prejudice (R. 217–218).

The intervenors, viewing the filing of plaintiffs' motion to dismiss without prejudice as ground for

[3] Act of April 21, 1934, c. 157, 48 Stat. 598, amended by the Act of June 20, 1934, c. 687, 48 Stat. 1184, and by the Act of August 24, 1935, c. 641, 49 Stat. 750, repealed by the Act of February 10, 1936, c. 42, 49 Stat. 1106.

[4] *Thompson* v. *Deal*, 92 F. 2d 478.

intervention by persons similarly situated, and claiming to be similarly situated, filed motions with the District Court for permission to intervene (R. 218–219, 228–229). The District Court denied the plaintiffs' motion to dismiss (R. 230), and granted intervenors' petitions to intervene and to file complaints in intervention (R. 220–236). The defendants were then permitted to file separate answers to the complaints in intervention (R. 229–230, 237) and the case, after pretrial hearing, was tried on the merits. The plaintiffs took no active part in the trial, either in person or by attorney, and the prosecution of the case was carried on exclusively by the intervenors. (R. 971–972.)

At the time of the commencement of plaintiffs' action, the defendant Henry A. Wallace was Secretary of Agriculture of the United States; the defendant Chester C. Davis was then Administrator of the Agricultural Adjustment Administration; and the defendant John B. Payne was then Comptroller of the Agricultural Adjustment Administration. The defendant Henry A. Wallace resigned his office on September 4, 1940; the defendant Chester C. Davis resigned his office on June 24, 1936; and the defendant John B. Payne resigned his office on May 18, 1936. Since these resignations none of the defendants have held the offices so theretofore held by them. (Findings I, II and III, R. 972–973.)

When this suit began, and for less than a month thereafter, the defendant Ernest L. Deal held the office of "Certificate Pool Manager". See *infra*, p. 8.[5]

The defendant W. A. Julian, at the time of the commencement of this action was and now is Treasurer of the United States (Finding V, R. 973).

On April 21, 1934, the Congress of the United States enacted what was thereafter commonly known as the Bankhead Cotton Act. The Act levied and assessed a tax on all cotton but exempted from the tax cotton to the extent of the allotment made to the farm on which grown; such allotments were made by the Secretary of Agriculture under regulations promulgated by him, and were evidenced by certificates of exemption issued by the Secretary to all producers who qualified therefor under the regulations. (Finding VI, R. 973–974.)

Under appropriate regulations, provision was also made for the issuance to producers of cotton of what were known as surplus cotton tax-exemption certificates. The certificates were to be issued by the Secretary of Agriculture in connection with the operation of what were known as surplus cotton tax-exemption certificate pools. The pools operated under the general supervision of the Director of the Division of Cotton, Agricultural

[5] Deal held this office until the repeal of the Bankhead Act, February 10, 1936, c. 42, 49 Stat. 1106 (R. 239).

Adjustment Administration, subject to the approval of the Administrator of the Agricultural Adjustment Administration, Department of Agriculture. (R. 974.)

Three pools were established under the regulations: The Surplus Cotton Tax-Exemption Certificate Pool, hereafter referred to as the 1934 pool; the National Surplus Cotton Tax-Exemption Certificate Pool, hereafter referred to as the 1935 pool; and the Special Surplus Cotton Tax-Exemption Certificate Pool, hereafter referred to as the special pool. (R. 974–975.)

The applicable regulations provided that so-called surplus cotton tax-exemption certificates, to be issued in connection with the pools, would be issued by Assistants in Cotton Adjustment in the respective counties of the States to producers of cotton, at the latter's request, in exchange only for certified checks, bank drafts or postal money-orders, made payable to the order of "Certificate Pool Manager", in an amount equal to a specified amount per pound for each pound of cotton covered by the certificate received in exchange therefor (R. 975).[6]

The surplus cotton tax-exemption certificates could be surrendered to and were accepted by Col-

[6] The Assistants in Cotton Adjustment, above referred to, were in the Extension Service of the Department of Agriculture and performed field functions for the Agricultural Adjustment Administration of the Department of Agriculture (R. 976).

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lectors of Internal Revenue, in lieu of the tax levied and assessed under the Bankhead Cotton Act which would otherwise be required to be paid in cash to Collectors of Internal Revenue on account of cotton subject to tax under the Act. After issuance, the surplus cotton tax-exemption certificates were assignable at the price per pound for which they were originally issued. (Finding VII, R. 976.)

The defendant, Ernest L. Deal, was, on September 5, 1934, designated "Certificate Pool Manager" by the Chief of the Cotton Production Section, Commodities Division, Agricultural Adjustment Administration, Department of Agriculture, and in such designation it was provided that he "as such, will manage the Surplus Cotton Tax-Exemption Certificate Pool in accordance with provisions of said Regulations and such amendments thereto as may be hereafter made by the Secretary." Although not formally designated, the defendant Deal acted as "Certificate Pool Manager" in connection with the operation of the 1935 pool and the special pool. (Finding VIII, R. 976.)

Prior to the issuance of any surplus cotton tax-exemption certificates, the Secretary of the Treasury and the Comptroller General, by appropriate official action, prescribed that all cashier's checks, money-orders, etc., received in exchange for so-called surplus cotton tax-exemption certificates, should be scheduled by the Department of Agri-

culture for collection by the Treasury Department of the United States, and that the proceeds from the collection thereof should be covered into the Treasury of the United States by appropriate covering warrant. Such action by the Secretary of the Treasury and the Comptroller General was taken under and pursuant to the terms and provisions of the Permanent Appropriation Repeal Act, 1934, ch. 756, 48 Stat. 1224. (Finding IX, R. 976–977.)

The plaintiffs and intervenors all applied to the Assistants in Cotton Adjustment in their respective counties for surplus cotton tax-exemption certificates and tendered in exchange therefor bank drafts and cashier's checks in the amount of $54,129.65.[7] The Assistants in Cotton Adjustment thereupon delivered to them the surplus cotton tax-exemption certificates, so applied for by them, and received in exchange therefor the bank drafts and cashier's checks so tendered. (R. 977–981.)

The Assistants in Cotton Adjustment, in due course, forwarded the cashier's checks and bank drafts to the Cotton Section of the Agricultural Adjustment Administration, Department of Agriculture at Washington, D. C. The drafts and checks, when received by the Cotton Section, were included with other checks in schedules of collec-

[7] The plaintiffs and intervenors received a total of $37,323.18 in benefit payments in connection with the cotton crop reduction program, and most received more benefit payments than the amounts they paid for exemption certificates (R. 979, 982–983).

tion and transmitted through the Comptroller of the Agricultural Adjustment Administration and the office of Budget and Finance to the Treasury Department of the United States for collection. The checks and drafts were thereupon and in due course collected by the Treasury Department of the United States. (R. 978–981.)

The proceeds from the checks and drafts of the plaintiffs and intervenors were, prior to the commencement of this suit on January 26, 1936,[8] covered into the Treasury of the United States by covering warrants duly and regularly signed by the Secretary of the Treasury and countersigned by the Comptroller General; upon the covering warrants the Treasurer of the United States duly indorsed his receipt for the moneys so covered. (R. 978–981.)

All money-orders, bank drafts, cashier's checks, etc., received by Assistants in Cotton Adjustment in exchange for so-called surplus cotton tax-exemption certificates in connection with the operations of the 1934 pool, 1935 pool and special pool, were all collected by the Treasury Department of the United States and the proceeds from the collection thereof officially and formally cov-

[8] A $784 cashier's check delivered by the intervenor Miller was collected by the Treasury Department of the United States on January 7, 1936, but the proceeds from the collection thereof were not formally and officially covered into the Treasury of the United States by covering warrant until April 30, 1936 (Finding XXIII, R. 984–985).

ered into the Treasury of the United States (R. 984).

Neither the Assistants in Cotton Adjustment nor the defendants, or either or any of them, at any time, made any demand on plaintiffs or intervenors, or either or any of them, that they secure surplus cotton tax-exemption certificates through or in connection with any of the pools, or that they pay any money or deliver any instruments for the payment of money, but on the contrary the Assistants in Cotton Adjustment and the defendants and each of them were wholly passive in the matter; all checks were received and certificates delivered in exchange therefor at the request of the plaintiffs and intervenors and not otherwise (Finding XX, R. 983).

The bank drafts and cashier's checks so delivered by the plaintiffs and intervenors to Assistants in Cotton Adjustment in exchange for surplus cotton tax-exemption certificates, were caused to be issued and delivered without protest and without any indication being given to the Assistants in Cotton Adjustment, or to either or any of the defendants, that the checks should not be disposed of in the manner and form in which they were thereafter disposed of, or that on account of the delivery of such checks the plaintiffs or intervenors, or either or any of them, would seek to hold the defendants, or either or

any of them, personally liable for the moneys evidenced by the checks (Finding XXI, R. 983).

The bank drafts and cashier's checks delivered by plaintiffs and intervenors, as hereinbefore set forth, were all scheduled for collection by the Department of Agriculture and collected by the Treasury Department of the United States for coverage into the Treasury of the United States, without defendants having been given any notice or intimation that plaintiffs or intervenors would make or intended to make any claim of irregularity of illegality respecting the transactions (Finding XXII, R. 983–984).

The total amount of money collected by the Treasury Department of the United States on postal money-orders, cashier's checks, etc., received by the Assistants in Cotton Adjustment in exchange for so-called cotton tax-exemption certificates issued in connection with the 1934 pool and covered into the Treasury of the United States by the covering warrants of the Secretary of the Treasury, countersigned by the Comptroller General, was $16,010,320.64. On account of the moneys so covered into the Treasury of the United States in connection with the operation of the 1934 pool, there was set up on the books of the Treasury Department of the United States, pursuant to appropriation warrants issued by the Secretary of the Treasury and countersigned by the Comptroller General, an appropriation account to which was credited the total amount of $16,010,320.64;

of the total amount so appropriated $15,978,-839.15 has been expended in accordance with the applicable Congressional appropriation and under accountable or pay warrants, signed by the Secretary of the Treasury and countersigned by the Comptroller General of the United States and upon vouchers duly issued and certified by a duly qualified certifying officer of the Department of Agriculture. The expenditures were all made by Government check issued in the usual manner by the Chief Disbursing Officer of the United States. There is now a balance to the credit of the appropriation in the amount of $31,481.49. The unexpended balance so remaining in the appropriation account is reflected on the books of the Government as follows: (1) Available for requisition by the Department of Agriculture, to the credit of the disbursing officer of the United States for expenditure within the purpose of the appropriation, $7,545.35 and (2) to the credit of the disbursing officer of the United States, representing the undisbursed balance of funds requisitioned to the credit of the disbursing officer with the approval of the Secretary of the Treasury and the Comptroller General, and for disbursement within the purpose of the appropriation, $23,936.14. (R. 985–986.)

The amounts of funds similarly collected and disposed of in connection with the 1935 pool and the

special pool are set out in the margin.[9]

The balances in the appropriation accounts represent the amount of prospective claims on issued checks to certificate depositors, which, for one reason or another, have not been paid and an amount representing "breakage". "Breakage" is that residue of the appropriated amounts that remained after applying the percentage distribution factor that resulted in the issuance of the checks that were intended as the payments to certificate depositors authorized by the Congressional appropriation. (Finding XXV, R. 988.)

The only payments made by the plaintiffs and intervenors in connection with the operation of the so-called "Surplus Cotton Tax-Exemption Certificate Pools", were those evidenced by the cashier's checks and bank drafts that were collected by the Treasury Department of the United States as set forth, *supra*, pp. 9–10 (Finding XXVII, R. 988).

The District Court made findings of fact and conclusions of law and entered its judgment dismissing the action on the merits (R. 972–990).

---

[9]

	1935 Pool	Special Pool
Covered into Treasury	$3,701,183.54	$2,711,514.69
Credited to appropriation account	$3,701,183.54	$2,711,514.69
Expended	$3,639,013.53	$2,689,100.25
Balance	$62,170.01	$22,414.44
(1) Available for requisition	$53,318.47	$8,561.39
(2) To credit of disbursing officer	$8,851.54	$13,853.05
	(Finding XXIV, R. 986–987)	(Finding XXIV, R. 987–988)

The intervenors appealed to the United States Court of Appeals for the District of Columbia and that court affirmed (R. 996).

ARGUMENT

1. Petitioners contend (Pet. 11) that the writ should be granted "to settle a direct conflict between the Court of Claims and the Court of Appeals concerning title to the trust fund here involved." In the instant case, relief was denied on two grounds: (1) The money paid by plaintiffs and intervenors did not become part of a fund in the possession and under the control of the defendants as individuals but on the contrary the money was in the Treasury of the United States and so beyond the reach of the court in the instant suit and (2) the defendants, under the facts as found, were not personally liable.

In the case of *Crain* v. *United States*, 44 F. Supp. 321 (C. Cls.), certiorari denied, 317 U. S. 667, referred to by petitioners, a producer sought recovery from the United States of the amount paid by him for surplus cotton tax-exemption certificates. When considering the possible liability of the United States to suit, on account of the receipt of the money into the Treasury, the court appears to have made a distinction between the receipt of money into what it referred to as the "general fund", and the receipt of money into what it referred to as a "trust fund". This distinction was made in partial support of the real

basis of the decision, which, as stated by the court (p. 326) was that—

> Plaintiffs' allegations are insufficient to establish an obligation on the part of the United States by way of a contract, either express or implied in fact, to subject the general fund of the Treasury to the payment of the sums which they seek to recover.

The court below never reached the question which was resolved against the plaintiff in the *Crain* case. It held that on the record in this case, it appeared that the funds were in the Treasury and not under the control of the defendants as individuals; hence it was unnecessary to decide whether the United States was in any way obligated to purchasers of exemption certificates.

2. While petitioners refer (Pet. 12–14) to Section 20 of the Permanent Appropriation Repeal Act, 1934, c. 756, 48 Stat. 1224 (Appendix, *infra*, p. 23), the construction of that Act was not and is not an issue in the instant suit. Neither the plaintiffs under the original complaint nor the intervenors in their complaints in intervention sought recovery on the theory or contention that the defendants were under a plain ministerial duty to pay money to them out of the Treasury of the United States as money appropriated by Congress for payment to them. If that had been the theory on which recovery was claimed, the suit would have failed because of the absence

of indispensable parties defendant. In such a suit the Secretary of the Treasury (R. S. Secs. 246, 248, Appendix, *infra,* pp. 21–22) and the Comptroller General of the United States would have been indispensable parties and so also would the depositors of certificates whose rights were claimed to have lapsed. It has been held, moreover, that this statute does not require payments to persons in a position comparable to, though better than, that of plaintiffs and intervenors here. *Stitzel-Weller Distillery* v. *Wickard,* 118 F. 2d 19 (App. D. C.)

We note that in this connection the petitioners have quoted from the decision in the case of *Morgenthau* v. *Fidelity & Deposit Co. of Maryland,* 94 F. 2d 632, 633 (App. D. C.). However, that case is authority for the proposition that when officers of the Treasury are under a plain ministerial duty to pay money out of the Treasury, pursuant to Congressional appropriation, the courts may compel an equitable, as well as a legal performance of that duty. Before that decision could be said to be applicable to the instant case, it would need appear that at the time of the trial the Secretary of the Treasury was under a plain ministerial duty to pay money out of the Treasury to parties to the suit as against whom the court should divert the payment to the plaintiffs and intervenors on equitable grounds. This, of course, is not the situation here.

3. Neither the plaintiffs nor intervenors were entitled to personal judgment in any amount

against the defendants, or either or any of them, collectable out of their personal estates.

There is no theory under which personal liability as for a tortious taking of money can be said to have been established against the defendant Deal. The plaintiffs and intervenors dealt with the Assistants in Cotton Adjustment. It was to them that plaintiffs and intervenors tendered the cashier's checks and demanded surplus cotton tax-exemption certificates in exchange therefor. Neither the Assistants in Cotton Adjustment nor the defendant Deal made any demands; they were wholly passive. Neither at the time of the delivery of the checks nor at any time before the proceeds of the checks were in the control of the United States did plaintiffs or intervenors give any intimation that they would seek to hold any person liable for the amount of the checks so tendered. The receipt and delivery of plaintiffs' and intervenors' checks and drafts did not impose any personal liability on the defendants. *Jiminez* v. *Domenech,* 80 F. 2d 767, 768 (C. C. A. 1st), and cases cited.

The suggestion is made (Pet. 8) that the defendant, W. A. Julian, became personally liable to plaintiffs and intervenors for having received the money into the Treasury and, thereafter paid money out of the Treasury pursuant to the warrants of the Secretary of the Treasury, countersigned by the Comptroller General. *Cooke* v. *United States,* 91 U. S. 389, 398. But Julian

could not become personally liable to plaintiffs and intervenors for having as Treasurer received money into the Treasury of the United States, pursuant to the covering warrants of the Secretary of the Treasury countersigned by the Comptroller General; neither could he become personally liable to plaintiffs and intervenors for having honored the warrants of the Secretary of the Treasury countersigned by the Comptroller General of the United States, for the payment of money out of the Treasury. The facts found by the District Court show that all withdrawals under the pool appropriation accounts were made under and pursuant to accountable or pay warrants, duly signed by the Secretary of the Treasury and countersigned by the Comptroller General. The actual payment of money under these pool appropriation accounts was made by the Chief Disbursing Officer of the United States. The acts of the defendant Julian were in discharge of duties imposed upon him as Treasurer of the United States. Sections 233, 246, 248, 301 and 305 of the Revised Statutes (Appendix, *infra,* pp. 21–23). He had "no authority to settle and adjust, that is to say, to determine upon the validity of, any claim against the government." *Cooke* v. *United States,* 91 U. S. 389, 399.

Finally, the petitioners suggest (Pet. 15) that the defendants Wallace, Payne, Davis and Deal may have become personally liable on account of money paid out of the Treasury under the

appropriation accounts, since the commencement of this suit. But, as the court below pointed out (R. 995)

> Purchase of extra allotment certificates was in every instance without protest or notice that claim on account thereof would be made. As a result, nothing appeared to put any one on notice of claim until the money got into the hands of the Treasurer or into the Treasury. It was then too late. Obviously, from the time of purchase the funds received therefor could be handled only in accordance with regulations set up to carry out the pool transactions. Whatever action was taken by any individual officer in relation to such funds was an act required and implied in the functions and duties incident to his office.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
JOHN E. GARVEY,
Special Assistants to the Attorney General.

FEBRUARY 1945.

APPENDIX

Constitution of the United States, Article I:

SECTION 9. * * *

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

* * * * *

Revised Statutes:

SEC. 233. There shall be at the seat of Government an Executive Department to be known as the Department of the Treasury, and a Secretary of the Treasury, who shall be the head thereof. (5 U. S. C., 241.)

SEC. 246 [as amended]. The Secretary of the Treasury may, by an appointment under his hand and official seal, delegate authority to the Assistant Secretaries of the Treasury to sign in his stead * * * all warrants for the payment of money into the public Treasury and all warrants for the disbursement from the Public Treasury of money certified by the General Accounting Office to be due upon accounts duly audited and settled by them * * *. (5 U. S. C. 248.)

SEC. 248. The Secretary of the Treasury shall, from time to time, digest and prepare plans for the improvement and management of the revenue, and for the support of the public credit; shall superintend the collection of the revenue; shall, from time

to time, prescribe the forms of keeping and rendering all public accounts and making returns; shall grant, under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law; shall make report, and give information to either branch of the legislature in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally shall perform all such services relative to the finances as he shall be directed to perform. (5 U. S. C. 242.)

SEC. 301 [as amended]. There shall be in the Department of the Treasury a Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of eight thousand dollars a year. (31 U. S. C. 141.)

SEC. 305 [as amended]. The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned in the General Accounting Office, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public treasury shall be valid. He shall render his accounts to the General Accounting Office quarterly, or oftener if required, and shall transmit a copy thereof, when settled, to the Secretary of the Treasury. He shall at all times submit to the Secre-

tary of the Treasury and the General Accounting Office, or either of them, the inspection of the moneys in his hands. (31 U. S. C. 147.)

Permanent Appropriation Repeal Act, 1934, c. 756, 48 Stat. 1224:

SEC. 20. (a) The funds appearing on the books of the Government and listed in subsections (b) and (c) of this section shall be classified on the books of the Treasury as trust funds. All moneys accruing to these funds are hereby appropriated, and shall be disbursed in compliance with the terms of the trust. Hereafter moneys received by the Government as trustee analogous to the funds named in subsections (b) and (c) of this section, not otherwise herein provided for, except moneys received by the Comptroller of the Currency or the Federal Deposit Insurance Corporation, shall likewise be deposited into the Treasury as trust funds with appropriate title, and all amounts credited to such trust-fund accounts are hereby appropriated and shall be disbursed in compliance with the terms of the trust: * * * (31 U. S. C. 725s.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 854.

R. H. ROBINSON, LOWRANCE BROTHERS & COMPANY, INC., a corporation, LYNN W. MORRILL, S. CARL MILLER, W. H. AMOS, and W. G. PARKER, intervenors below, suing on behalf of themselves and other cotton producers similarly situated (including JAMES WYNN THOMPSON, JR., A. W. FISHER, D. S. HOPSON, and ALLIE H. WARD, Administratrix, the original plaintiffs below), *Petitioners*,

v.

ERNEST L. DEAL, Individually and as Manager of the National Surplus Cotton Tax Exemption Certificate Pool, 1935, HENRY A. WALLACE, Individually and as Secretary of Agriculture of the United States, W. A. JULIAN, Individually and as Treasurer of the United States, JOHN B. PAYNE, Individually and as Comptroller of the Agricultural Adjustment Administration, and CHESTER C. DAVIS, Individually and as Administrator of the Agricultural Adjustment Administration, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF OF PETITIONERS.

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February, 1945.

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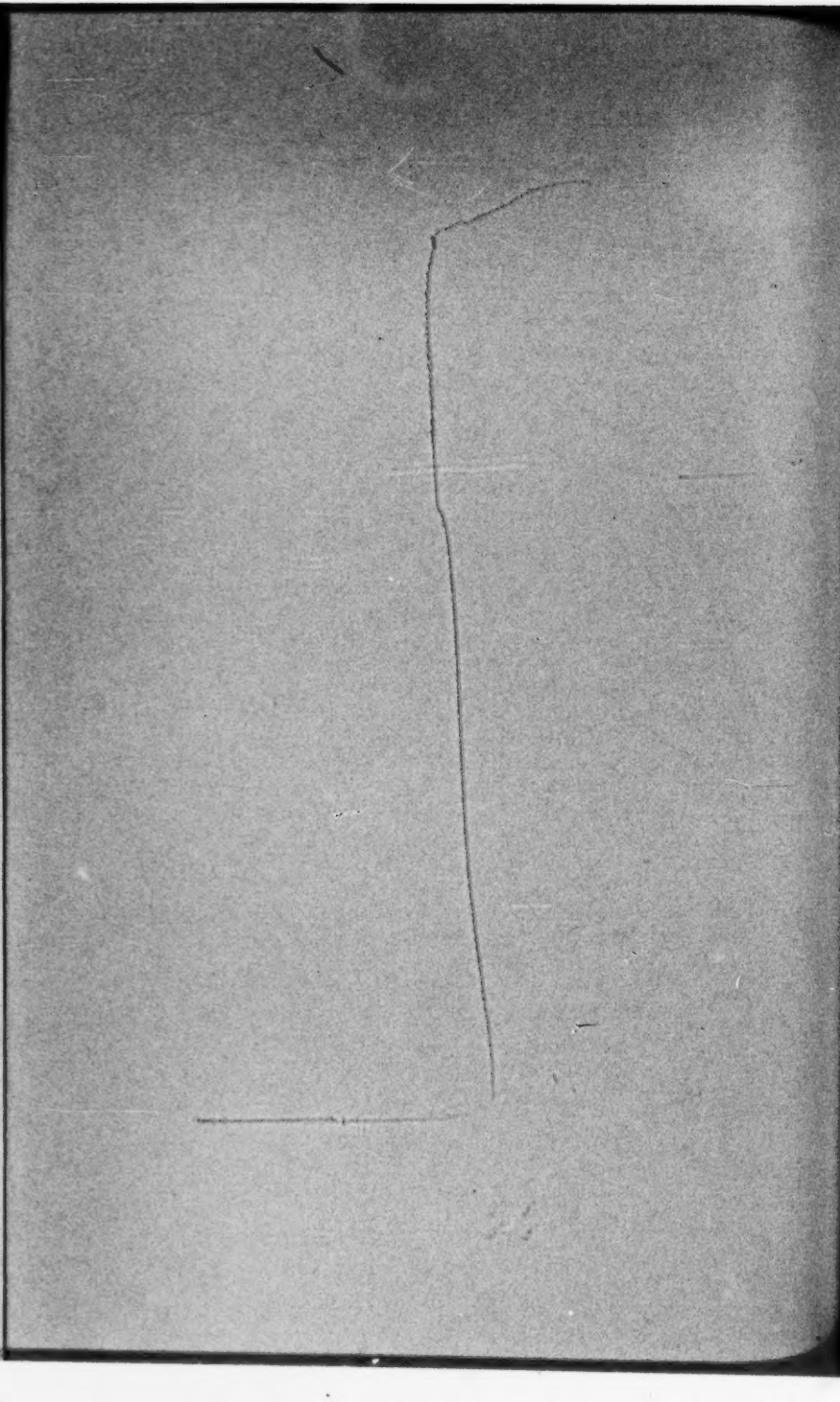

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF OF PETITIONERS.

The brief of respondents in opposition to the petition for a writ of certiorari was served on petitioners on February 9, 1945. This reply brief is filed pursuant to subdivision 4(a) of Rule 38 of the Revised Rules of the Supreme Court.

QUESTIONS PRESENTED.

In a footnote on page 2 of their brief respondents take exception to the statement of the questions presented as phrased by petitioners. It is only by diverting the attention of the Court from petitioners' question 3 that respondents can escape the consequences of their own *personal admissions* that the facts here involved are substantially as claimed by petitioners. If permitted to avoid these admissions, respondents then would not have to face petitioners' question 4.

The first question as stated by respondents appears to present in substance the first and second questions claimed to be presented by petitioners. Respondents' second question raises the same issue as that presented by petitioners' question 5 except that the parties differ on the fact of notice.[1]

STATEMENT.

The statement of the case made by respondents follows the findings of fact of the District Court. Since petitioners have assigned errors based on many of the findings of fact of the District Court, detailed exceptions to the statement of respondents will not be set forth herein. Petitioners suggest that the statement of the case as prepared by them (Pet. 4-10) correctly sets forth *all* the facts here involved.

On page 6 of their brief respondents in a footnote contend that Deal held office only until February 10, 1936. Since Deal was sued personally (Pet. 22), his official position is immaterial. Furthermore, he distributed over $5,000,000 of pool funds after February 10, 1936 (R. 501; Pet. 20), at which time he felt himself fully empowered to act. (Cf. his language at R. 839.)

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[1] Since $799,000 (including $784.00 paid by petitioner Miller) was not covered into the United States Treasury until April 30, 1936 (R. 567, 954, 984-985), after respondents were expressly notified of the claims of the class here involved (R. 836-837), it is difficult to understand respondents' implication that this money was received by the United States without notice.

Respondents also point out (Br. 9) that certain of the parties received certain benefit payments. While such a fact, if material, goes more to the merits of the case than to a consideration of the pending petition, it is believed that such benefit payments are no more relevant than would be pension payments from the Veterans Bureau. No issue is raised by the pleadings with respect to these benefit payments, petitioner Morrill did not receive one cent of benefit payments under any program (R. 711-713, 770), and respondents because of their coercion of the original plaintiffs (R. 993-994), lack the requisite clean hands to urge any such equitable defense.

ARGUMENT.

I.

Respondents contend (Br. 15) that there is no conflict between the Court of Appeals and the Court of Claims as was asserted by petitioners (Pet. 11). Surprisingly, however, respondent bottom their argument solely on the *Crain* case which was decided on a demurrer. The distinction between "general funds" and "trust funds" which respondents now urge (Br. 15), was clearly presented to the Court of Claims by the government in the *Brackin* case. (See pp. 23-30 of the petition for a writ of certiorari in *Brackin* v. *United States*, Oct. Term, 1942, No. 363.)[2] The government with knowledge of this distinction was opposing certiorari in the *Brackin* case because the United States had no interest in the fund (*Ibid.*, Brief in Opposition, p. 6, and cf., footnote 2), based in part on information from respondent Deal (R. 869-878), and was doing so almost contemporaneously with the filing herein by Deal of answers asserting that the claims presently before the Court "are, in effect, claims against the United States" (R. 246, 301).

[2] A court has power to take judicial notice of proceedings before it in a prior case. Cf. *United States* v. *Pink*, 315 U. S. 203, 216; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Dimmick* v. *Tompkins*, 194 U. S. 540, 548.

Petitioners respectfully submit that the conflict is apparent. It is also submitted that under principles of estoppel by judicial record, respondents may not now deny the conflict which was once recognized. As was said in *State Farm Mut. Auto. Ins. Co.* v. *Bonacci*, 8 Cir., 111 F. 2d 412, 419—

> A party can not in his own case, be heard by a court to deny today what he solemnly swore was true on yesterday, without some explanation or excuse.

Cf. *Axelrod* v. *Osage Oil & Refining Co.*, 8 Cir., 29 F. 2d 712, 729; *Metropolitan Life Ins. Co.* v. *Burch*, 39 App. D. C. 397, 404

II.

The *Stitzel-Weller Distillery* v. *Wickard* case on which respondents rely (Br. 17) presented a fact situation in which the United States was a trustee—the Secretary of Agriculture entering into the trust agreement there involved in his *official capacity*. Significantly the Court below in deciding the *Stitzel-Weller* case expressly distinguished that case from the instant proceeding on the ground that here no interest of the United States is involved (111 F. 2d 22). The issue, therefore, is simply whether under the Permanent Appropriation Repeal Act contributors to a trust can recover their contributions after the trust fails when the money is in the Treasury of the United States and the United States makes no claim to the money. It appears in all fairness that the courts should divert the payment to the contributors as was done in *Morgenthau* v. *Fidelity & Deposit Co. of Maryland*, 94 F. 2d 632. If the *Stitzel-Weller* case should be deemed to hold otherwise, however, then the two cited decisions are also in conflict and this Court should resolve their differences.

III.

Respondents conclude with the suggestion that they all acted without notice. Yet the facts show otherwise. This Court on January 6, 1936, declared the Agricultural Adjustment Act to be unconstitutional and strongly indicated that the Bankhead Cotton Act was also invalid. *United States* v. *Butler,* 297 U. S. 1, 71 (Cf. Pet. 21). If respondents were in doubt as to the legal authority for their actions at that time, they were all notified of the claims of plaintiffs on January 27, 1936, when the complaint in this suit was served on them (R. 116). They were also notified of the claims of the class by a letter from counsel for the original plaintiffs (R. 836-837).

Since respondents after these notices saw fit to distribute over $5,000,000 in derogation of the rights of petitioners and to place over $799,000 in the Treasury of the United States (R. 954)[3], it is believed they have no standing to assert that they should not be held personally liable. Certainly, respondents collectively could have refused to disburse the $5,000,000 until the rights of the parties were settled, could have paid the money into the registry of the District Court, or at least could have refrained from covering the money—then in their hands—into the Treasury of the United States. This is clear from the fact that under the latest regulations dealing with the pool, respondent Wallace reserved the right to prescribe how the funds in the pool "shall be handled and disbursed" (R. 43).

CONCLUSION.

Petitioners respectfully submit that a direct controversy exists between the holdings of the lower courts on a matter of interest to some 100,000 cotton producers. It is believed

that this Court should grant the writ to settle the existing conflict and also to fix the rights of contributors to money in the Treasury of the United States with respect to which the United States makes no claim.

Respectfully submitted,

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Attorneys for Petitioners.

February, 1945.

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[3] Over $116,000 of which admittedly is still in the Treasury (Br. 13-14).

End